

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EPHRAIM JENKINS,

Petitioner,

vs.

ROSEANNE CAMPBELL, Warden,

Respondent.

C 06-3966 MJJ (PR)

**ORDER GRANTING MOTION
TO DISMISS**

(Docket No. 8)

Petitioner, a California prisoner, filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254. After reviewing the petition, the Court ordered respondent to file an answer showing cause why the petition should not be granted based on petitioner's cognizable claims, or alternatively to file a motion to dismiss on procedural grounds, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases ("Rule 4"). Respondent chose the latter course, and has filed a motion to dismiss the petition as untimely. Petitioner has filed an opposition. Although ordered to so, respondent has not filed a reply.

BACKGROUND

On May 10, 1999, the Santa Clara County Superior Court sentenced petitioner to a term of life in state prison with the possibility of parole plus twelve years based on his convictions for attempted murder, mayhem, kidnaping, first degree burglary, and assault with intent to commit rape, and sentence enhancements for the use of a knife and infliction of great bodily injury. The California Court of Appeal affirmed the conviction, and the Supreme Court of California denied the petition for review on August 9, 2000. On September 24, 2003, petitioner filed his first petition for a writ of habeas corpus in the state courts in the California Court of Appeal. The petition was denied on November 25, 2003.

1 On December 3, 2003, petitioner filed a habeas petition in the California Supreme Court,
 2 which was denied on September 22, 2004. On January 18, 2005, petitioner filed a habeas
 3 petition in the Alameda County Superior Court, which was denied the same date. On April 8,
 4 2005, petitioner filed a habeas petition in the California Court of Appeal, which was denied
 5 on May 10, 2005. Finally, petitioner filed a habeas petition in the California Supreme Court
 6 on June 27, 2005, and this last petition was denied on May 10, 2006. On June 21, 2006,
 7 petitioner filed the instant petition in this court.¹

8 DISCUSSION

9 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became law
 10 on April 24, 1996, and imposed for the first time a statute of limitations on petitions for a
 11 writ of habeas corpus filed by state prisoners. Under AEDPA, petitions filed by prisoners
 12 challenging non-capital state convictions or sentences must be filed within one year from
 13 "the date on which the judgment became final by conclusion of direct review or the
 14 expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).²

15 Here, the state courts' direct review of petitioner's conviction and sentence ended on
 16 August 9, 2000, when the Supreme Court of California denied his petition for review. The
 17 "time for seeking" direct review under 28 U.S.C. § 2244(d)(1)(A) includes, however, the
 18 ninety-day period within which a petitioner can file a petition for a writ of certiorari in the
 19 United States Supreme Court under Supreme Court Rule 13, whether or not the petitioner
 20 actually files such a petition. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). As a
 21 result, petitioner's "time for seeking" direct review expired on November 7, 2000, ninety
 22 days after August 9, 2000. The limitations period expired one year later, on November 7,
 23 2001. As noted, the instant petition is deemed filed in federal court on June 21, 2006, over
 24 four and a half years after the limitations period expired. Consequently, absent tolling, the
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 27 ¹A pro se petitioner's federal petition is considered "filed" on the day it was signed and
 28 presumably given to prison authorities for mailing. See generally Houston v. Lack, 487 U.S. 266, 276
 (1988).

²In rare instances, not presented by the instant petition, the limitations period may run from a
 date later than the date on which the judgment became final. See 28 U.S.C. § 2244(d)(1)(B)-(D).

1 instant petition is untimely.

2 The one-year limitation period is tolled for the “time during which a properly filed
3 application for State post-conviction or other collateral review with respect to the pertinent
4 judgment or claim is pending.” See 28 U.S.C. § 2244(d)(2). Petitioner’s first state habeas
5 petition was filed in the California Court of Appeal on September 24, 2003, nearly two
6 years after the limitations period expired. In such circumstances, when a state habeas
7 petition is filed after the limitations period in AEDPA has already expired, there is no
8 tolling under § 2244(d)(2). See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
9 (holding “section 2244(d) does not permit the reinitiation of the limitations period that has
10 ended before the state petition was filed”). Consequently, the instant petition is not
11 rendered timely by virtue of the tolling provided by § 2244(d)(2).

12 Petitioner argues “the facts in which petitioner relies upon took time to understand,
13 research and prepare being that he was not well versed at law.”³ (Opposition at 4.) Equitable
14 tolling will not be available in most cases because extensions of time should be granted only
15 if “extraordinary circumstances beyond a prisoner’s control make it impossible to file a
16 petition on time.” Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288
17 (9th Cir. 1997) (citation and internal quotation omitted). The Ninth Circuit has held that the
18 petitioner bears the burden of showing that this “extraordinary exclusion” should apply to
19 him. Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). The petitioner must establish
20 two elements in order to be granted equitable tolling: “(1) that he has been pursuing his rights
21 diligently, and (2) that some extraordinary circumstance stood in his way.” Raspberry v.
22 Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006) (quoting Pace, 544 U.S. at 419). When a
23 prisoner is proceeding pro se, his allegations regarding diligence in filing a federal petition
24 on time must be construed liberally. Roy v. Lampert, 455 F.3d 945, 950 (9th Cir. 2006).
25 Petitioner’s lack of legal experience does not constitute an extraordinary circumstance
26 warranting equitable tolling, see Raspberry, 448 F.3d at 1154, nor does his indigence, Cantu-
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28 ³Petitioner asserts “no appeal was taken from the judgment” in his case. (Opposition at 4.)
The state appellate record indicates counsel filed a “no issues” appeal pursuant to People v. Wendy, 25
Cal. 3d 436 (1979). (Resp. Ex. C.)

1 Tzin v. Johnson, 162 F.3d 295, 299-300 (5th Cir. 1998) (pro se status during state habeas
2 proceedings did not justify equitable tolling). In addition, petitioner makes no assertion that
3 he expended "diligent efforts" in pursuing his state habeas petition. Accordingly, even
4 liberally construing petitioner's allegations in his favor, he has not set forth a basis for
5 equitable tolling in this case. Accordingly, the petition must be dismissed as untimely.


6 **CONCLUSION**

7 For the foregoing reasons, respondent's motion to dismiss is hereby GRANTED and
8 the petition for a writ of habeas corpus is hereby DISMISSED.

9 This order terminates Docket No. 8.

10 IT IS SO ORDERED.

11 DATED: 10 / 13 / 2007

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13 MARTIN J. JENKINS
14 United States District Judge
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